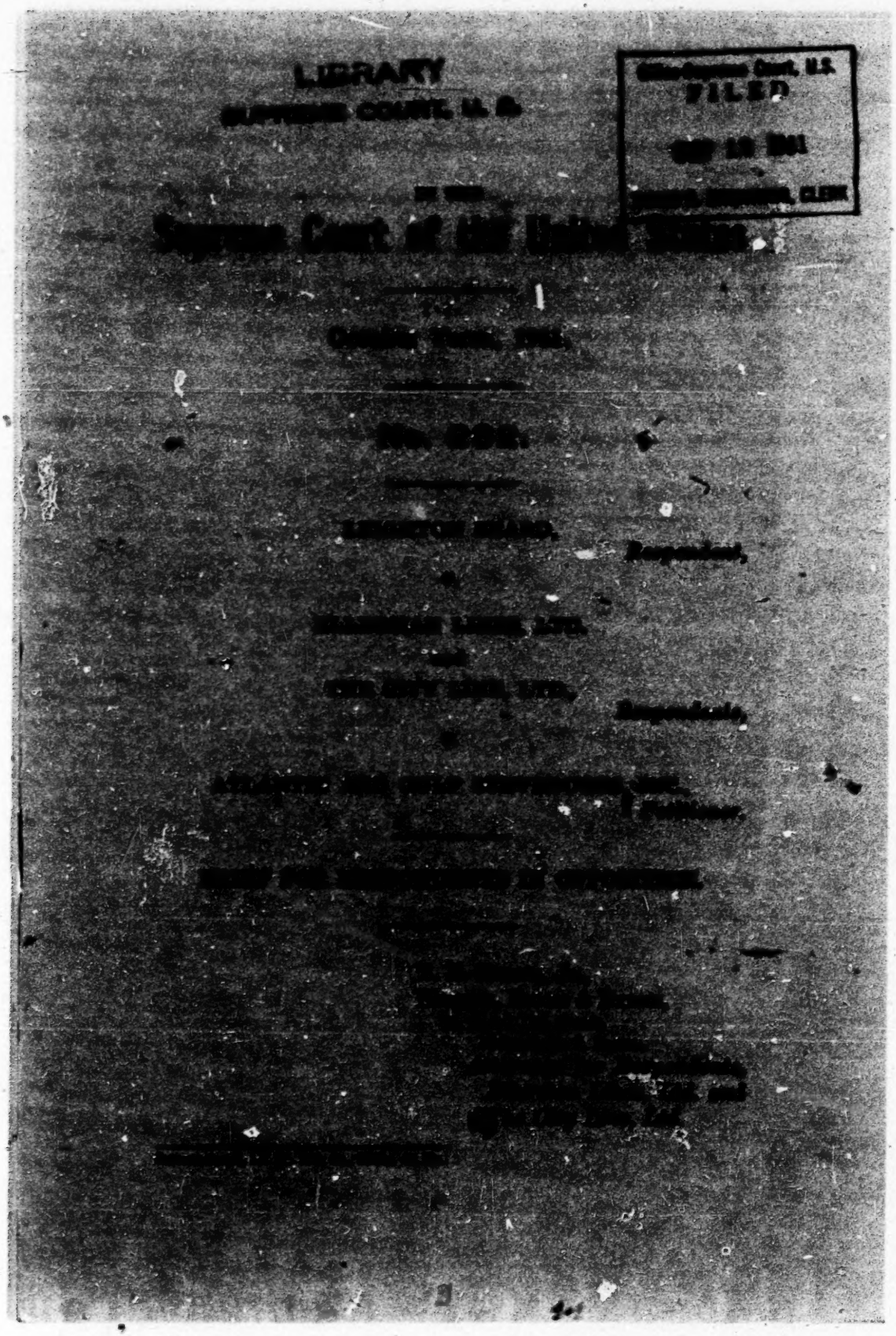
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1961.

No. 282.

LEIGHTON BEARD,

Respondent,

v.

ELLERMAN LINES, LTD.

and

THE CITY LINE, LTD.,

Respondents,

v.

ATLANTIC AND GULF STEVEDORES, INC.,

Petitioner.

BRIEF FOR RESPONDENTS IN OPPOSITION.

These respondents do not dispute the accuracy of the matters under the headings "Opinion of the Courts Below"; "Jurisdiction" and "Statement of the Case" as presented in the petition, and these are accordingly omitted in the interest of brevity.

QUESTION PRESENTED.

In an action where the parties, P. v. D1 v. D2, are a longshoreman, a shipowner and a stevedore-contractor respectively, and the Court of Appeals sustains a verdict in favor of P. against D1 solely upon the ground that P. "was injured as a result of negligent conduct of the discharging operation" performed by D2, may not the Court enter judgment for indemnity as a matter of law where there was no jury finding upon this point because, as the Court of Appeals said:

> ". . . the District Court failed to instruct the jury that it was a breach of Atlantic's contract to carry on the discharging operation in an unsafe place to work . . ." [Opinion 16a]?

REASONS WHY THE PETITION SHOULD BE DENIED.

This is not so much a brief in outright opposition to the petition of Atlantic and Gulf Stevedores, Inc. [hereinafter "petitioner" or "Atlantic"] as it is an examination of the grounds which Atlantic asserts in support of its petition. Respondent, [Ellerman] asserts that the grounds urged by Atlantic do not in fact exist, although if certiorari should be granted upon the petition in No. 284 [*Ellerman v. Beard*] it may seem wise to the Court to examine all facets of the litigation. Atlantic's petition demonstrates inconsistency in answers by the jury to interrogatories upon Special Verdict [F. R. C. P. 49] but does not demonstrate harm to itself if the court below was right in the way it resolved the case of P. v. D1.

Petitioner's Argument That It Was Deprived of the Right of Trial by Jury Is Erroneous and Will Not Stand Analysis.

The main point attempted to be made by petitioner is addressed to the Seventh Amendment. Atlantic contends

that the Court of Appeals erred in holding that Ellerman [petitioner in No. 284; respondent here], was entitled to judgment for indemnity as a matter of law if Ellerman was liable to the original plaintiff, Beard [respondent in No. 284]. Atlantic says that this was a fact question which the jury had decided. We will demonstrate that it was not a fact question; that the jury did not decide it; and, as the Court of Appeals points out, the point upon which Atlantic was held liable to Ellerman was never submitted to the jury.

The case in its setting must be recalled. A longshoreman, injured upon a ship, had sued the shipowner. The shipowner impleaded the stevedoring company which employed the longshoreman. In the action of P. v. D1, the District Court charged the jury, in substance, that it could find in favor of P. upon any one of three theories which we will summarize as follows:[1]

1. The use of the hook-band method of discharging bales of cargo;

2. The failure of the ship's chief mate to stop the stevedore from using the hook-band method of discharge; or

3. Failing to discharge other cargo destined for another port but which remained in the ship at the time of this accident, i.e., the theory of conducting the work in a place which was unsafe.

With these three alternative hypotheses or theories of liability submitted to it, and under an instruction [we think erroneous—see petition in No. 284] which permitted a finding in favor of the plaintiff against Ellerman [D1], if the jury believed Ellerman negligent with respect to any one of the three, we can analyze this case in its setting.

When the District Court charged the jury with respect to the case of D1 v. D2 for indemnity, however, the possible

1. See similar statement in petition in No. 284, page 10.

liability of Atlantic for indemnity upon the third theory stated above was never submitted to the jury for its consideration. This portion of the charge of the court appears at page 172a of the record.[2]

It is perfectly plain from the language of the District Court in its charge to the jury that what was submitted for jury consideration in the case of D1 v. D2 was whether:

> ". . . that condition was *created by* Atlantic and Gulf Stevedores. That is your *criterion:* Did Atlantic and Gulf Stevedores *create the condition* which made Ellerman Lines and The City Line responsible to the plaintiff? There again you have to run the whole gamut of facts in the case. You will have to decide whether or not there was an unreasonable discharge of this cargo, *an unsafe method used in the discharging of this cargo, in the placing of the hook.*" [Emphasis ours.]

Thus it is clear that in the case of D1 v. D2, the District Court did not submit to the jury, and there is, therefore, no jury finding such as that which this petitioner seeks to persuade this Court is involved in this case.

We now proceed to an analysis of what the Court of Appeals did in its opinion. We think it erred in its attempt to reconcile the jury's findings for there was no way in which the court could have known which of the three theories the jury adopted in determining this respondent's liability to the original plaintiff. See petition in No. 284. The present petition points up [petition, page 11] some of the error which forms the basis of the petition in No. 284. However, the petitioner seeks to take full advantage of what it concedes is an inconsistent jury verdict.

The petitioner, Atlantic, was an independent contractor. Its compensation was at a set rate per ton for offloading cargo. The respondent, Ellerman, did not direct or select the method. In fact, Ellerman's mate protested the method

2. Appellant's Appendix in Court of Appeals, Printed in Green Cover.

adopted by the stevedore as dangerous. It was conceded and never contested that the method of discharging was exclusively Atlantic's.

If the jury found the method improper and based liability in favor of the original plaintiff upon the ground that Ellerman was negligent for *permitting* this method to be used, it is clear that the actor, Atlantic, employing the condemned method would be acting improperly for using it. The answer of the jury to one of the interrogatories found that Atlantic was not negligent and had not breached its contract by adopting the hook-band method of discharging. The Court of Appeals reasoned, that if the method Atlantic had adopted was safe and adequate, then the jury finding of negligence as to Ellerman could not have been predicated upon the concept that Ellerman permitted Atlantic to use the particular method of discharge.

The Court of Appeals reasoned that since the jury's answer to an interrogatory in favor of Atlantic indicated that Atlantic had not breached its obligation to perform its contract of "workmanlike service" by use of the hook-band method, then the finding by the same jury of negligence on the part of Ellerman could not have been the use by Atlantic of the hook-band method of discharging.

Having reached that point, it was *a fortiori* reasoning that Ellerman's negligence could not have been point No. 2 above, the failure of the ship's officer to stop the stevedore from using the hook-band method of discharging. Ellerman's negligence could not have consisted in its failure to stop Atlantic from using a proper method of discharge. The Court of Appeals reasoned that otherwise there would have been complete inconsistency within the jury's answer to the special interrogatories. It adopted this method of reconciling them. Inconsistency was not to be presumed.

The Court of Appeals, therefore, looked to the answer of the jury to interrogatory No. 4 finding that Atlantic had performed its contractual obligation. To the Court of Ap-

peals that necessarily implied that the hook-band method of discharge was a proper one and, therefore, Ellerman was not negligent for permitting its use. The same is true of the fact that the ship's mate did not stop the use of the hook-band method of discharge.

The Court of Appeals, refusing to find inconsistency in the jury verdict, assumed consistency. It, therefore, reasoned that the jury's finding in Ellerman's negligence had to be based upon the third proposition stated above, that Ellerman failed to use reasonable care to provide the plaintiff below with a place to work which was reasonably safe. This had to do with the presence of cargo in the hold which was destined for another port. That the District Judge had instructed the jury that this was a permissible ground for a finding against Ellerman is clear from its charge [R166a] and it is equally clear [R172a] that the District Court did not submit this ground to the jury as a possible basis for a finding in favor of Ellerman and against the present petitioner. The opinion of the Court of Appeals [R16a] carefully points out that the District Court committed error when "the District Court failed to instruct the jury that it was a breach of Atlantic's contract to carry on the discharging operation in an unsafe place to work . . ."

We think it thus plain that Atlantic's main point in support of its petition claiming that it had been deprived of the benefit of a jury finding is simply not sustained by the facts. Petitioner cannot claim that the jury finding covered all grounds when a reference to the charge by the trial judge to the jury demonstrates so clearly that the point in question was never in fact submitted to the jury for determination.

If, therefore, the basis of the finding of Ellerman's negligence was that it permitted work to be carried on in a place where the presence of other cargo made it dangerous to perform the work, it must be remembered that the person who actually carried on the work was Atlantic. This

ground of petitioner's liability to Ellerman for indemnity was never submitted to the jury and the jury never passed upon the "calling into play" doctrine of this Court's decision in *Crumady v. The Joachim Hendrik Fisser*, 358 U. S. 423 [1959] and other cases.

Thus it is clear that the decision which this petitioner seeks to have this Court review can be distilled down to the proposition that if it was negligence for Ellerman [shipowner] to permit petitioner [Atlantic] and its employee, Beard [the plaintiff below] to work in a place which was unsafe due to the presence of other cargo, *it was negligent breach of Atlantic's contract* with Ellerman for Atlantic *to proceed with the work in a place which was not safe.* After all, it was Atlantic, not Ellerman, who was the actor. It was Atlantic, not Ellerman, who was the expert. It was Atlantic which was obligated by its contract with Ellerman to perform the work of unloading so that it did not expose Ellerman to liability or bring into play by its operation a condition which would foreseeably visit liability in damages upon Ellerman. That is the import of a whole line of decisions by this Court.[3]

In *Weyerhaeuser S. S. Co. v. Nacirema Operating Co.*, 355 U. S. 563, this Court cited with approval the Fourth Circuit's decision in *Cornec v. Baltimore & Ohio R. Co.*[4] There the late Chief Justice Parker said:

> ". . . The instrumentalities used for loading and the methods of work, however, are matters within the control of the contracting stevedore. In the absence of some showing that the master directed the use of negligent methods, expressly approved them, or consented to their use, we know of no principle upon which the stevedore can be absolved from liability to the vessel . . ."

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3. *Ryan Stevedoring Co. v. Pan-Atlantic S. S. Corp.*, 350 U. S. 124 [1955]; *Weyerhaeuser Steamship Co. v. Nacirema Operating Co.*, 355 U. S. 563 [1958]; *Crumady v. The Joachim Hendrik Fisser*, 358 U. S. 423 [1959]; *Waterman S. S. Corp. v. Dugan & McNamara, Inc.*, 81 S. Ct. 200 [1960].

4. 48 F. 2d 497, cert. denied, 284 U. S. 621 [1931].

Atlantic appears to have a basic misconception as to the scope of a jury finding. It regards the case as if all that the jury found was a single answer to a single interrogatory exonerating Atlantic from contract breach by reason of the use of the hook-hand method of discharge. But Atlantic was a party to the entire trial and jury findings upon other points are still binding upon it even though the specific interrogatory addressed to the jury may involve the question of the negligence of another party to the lawsuit. In this connection it is worthwhile to examine the decision in *Crawford v. Pope & Talbot, Inc.*,[5] cited with approval by this Court in its opinion in *Weyerhaeuser Steamship Co. v. Nacirema Operating Co.*[6] Particularly apt is the analysis made in the discussion in *Crawford* beginning at the bottom of page 793 of 206 F. 2d. The discussion in that case was as to the effect of finding upon one not a party, but here Atlantic was a party and cannot ignore the other jury findings in this case in which it participated.

Probably the thing which Atlantic's petition best demonstrates is that there was inconsistency in the jury findings particularly as they pertain to the case of P. v. D1. That only emphasizes that Ellerman's petition in No. 294 should be granted, for surely if the Court of Appeals could rationalize the inconsistent verdict and sustain the judgment in favor of the plaintiff as against Ellerman, then as a matter of law the court below was right in awarding Ellerman judgment against Atlantic and that holding is in no way inconsistent with any jury finding.

No New Point Is Presented by the Second Point in the Petition With Respect to Interpretation of a Written Contract.

We can dispose of Atlantic's second point briefly. It seeks to draw a distinction between the present case where there was a written contract and this Court's holdings in

5. 206 F. 2d 784 [1953].
6. 355 U. S. 563 at 568.

Ryan Stevedoring Co. v. Pan-Atlantic Steamship Corp.[7] and *American Stevedores, Inc. v. Porello.*[8] In so doing, Atlantic overlooks the important distinction between an implied contract and a term implied in a written contract.

It is to be noted that Atlantic does not make reference to the particular contract involved in the present case. An examination of it will show conclusively that this question is simply not covered. There is no language about which parties may argue their differing intents, such as in *American Stevedores, Inc. v. Porello.* Since the point is not covered, then the law, through decisions of this Court which we need not repeat here, has held that it is an implied term that the stevedore will perform his work "in a workmanlike manner" and refrain from conduct which will foreseeably visit liability upon the shipowner, the other party to the contract. Arguments similar to this have been addressed to courts before and have received clear and concise answer. We can do no better than to cite to this Court the decisions in *Read v. United States,* 201 F. 2d 758 [1953], commencing at the bottom of page 762, and the decision in *Olszczuk v. Calmar Steamship Corp.,* 164 F. Supp. 628 at 632, affirmed, *sub nom. Calmar Steamship Corp. v. Nacirema Operating Co.,* 266 F. 2d 79, cert. denied, 361 U. S. 816 [1959].

There Is No Conflict Among the Circuits Upon the Question of Shipowner's Right to Indemnity.

Commencing at page 23 of Atlantic's petition, it attempts to demonstrate conflict, but an examination of the cases upon which it relies fails to reveal conflict in fact. Its two main cases said to be in conflict with the decision below are *United States v. Harrison,* 245 F. 2d 911 [C. A. 9, 1957] and *Ameroccan Steamship Co. v. Copp,* 245 F. 2d 291 [C. A. 9, 1957].

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7. 350 U. S. 124 [1955].
8. 330 U. S. 446 [1947].

The short answer to the allegation of conflict as to the *Harrison* case is to read the terms of the contract there involved which are reproduced at page 913 of 245 F. 2d. If the contract between Ellerman and Atlantic in the case at bar had contained similar provisions it might well be that the present case would have had a different result. In the absence of contractual language such as was before the court in the *Harrison* case, there is no conflict and nothing that even approaches a conflict with the decision in the instant case.

Amerocean Steamship Co. v. Copp is likewise distinguishable. It was not a "calling into play" situation such as we have in the case at bar. Rather [245 F. 2d at 294] the finding of the trial court was that the joint acts of negligence of D1 and D2 brought about injury. The court, therefore, applied this Court's decision in *Halcyon Lines v. Haenn Ship Ceiling & Refitting Corp.*, 342 U. S. 282 [1952] and denied the shipowner recovery. That is quite a different situation on its facts than the present case.

CONCLUSION.

Atlantic's long and almost emotional petition destroys only a paper tiger of its own creation. We think it manifest that if the Court of Appeals could legitimately reconcile apparent inconsistency in the jury's answers to interrogatories and could hold Ellerman liable to the plaintiff, then the judgment for indemnity followed under principles clearly established by authoritative decisions of this Court.

In closing we make one other observation. At trial the charge of the court submitted the case to the jury under three possible theories of the liability of Ellerman, but submitted the case of Atlantic's liability to indemnify Ellerman only under the so-called "hook-band" method of discharging. As the Court of Appeals points out [R16a]:

> ". . . the District Court failed to instruct the jury that it was a breach of Atlantic's contract to carry on

the discharging operation in an unsafe place to work . . . ."

Ellerman took exception to this. Where a case is tried upon a Special Verdict, F. R. C. P. 49 controls. It clearly provides that if in submitting interrogatories to the jury the court omits an issue, "each party waives his right to a trial by jury of the issue so omitted . . ." Atlantic waived; Ellerman did not.

It is, therefore, a matter of semantics whether the Court of Appeals, considering the indemnity phase of the case only, pointed out to the District Court that it should have granted binding instructions to the jury upon this point and then remanded the case to the District Court for the entry of judgment in accordance with the Circuit Court's opinion or whether the Court of Appeals directed the entry of judgment. In either case the result would be the same and Atlantic has no just cause for complaint which would require review by this Court of this portion of the case.

Unless this Court grants certiorari in the petition in No. 284 and then determines that it desires to have all phases of this case before it, there is no ground for granting the petition of Atlantic alone, and it should be denied.

Respectfully submitted,

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